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No. 99-1613

IN THE SUPREME COURT OF THE UNITED STATES

NOV 13, 2000

Robert Shaw; Larry Bearley; Michael Mahoney; Myron Beeson; and Richard S. Day,
Petitioners,
v.
Kevin Murphy,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE Brief of the States of Florida, Alabama, Arkansas, Delaware, Illinois, Iowa, Kansas, Louisiana, Commonwealth of Massachusetts, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Utah, Vermont and Commonwealth of Virginia in Support of Petitioners

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution guarantee a state prison inmate law clerk the unrestricted right to communicate with another state prison inmate regarding a pending legal matter ?

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INTEREST OF *AMICI*

The *amici* States operate prison systems in their respective jurisdictions and each has regulations or policies which, in furtherance of "legitimate penological interests," prohibit or restrict correspondence between inmates even if the correspondence purportedly relates to legal matters. The validity of those regulations is called into question by the Ninth Circuit's holding. Furthermore, the States' ability to maintain the order and security of their prisons will be undermined if the Court affirms the expansive First Amendment right recognized by the Ninth Circuit.

SUMMARY OF ARGUMENT

The Court has historically been sensitive to the volatile nature of the prison environment and has consistently recognized that state prison inmates do not enjoy unrestricted First Amendment rights of expression and association. Specific examples from the states show that inmates repeatedly attempt to exchange contraband including escape plans, weapons, child pornography, and drugs, under the guise of legal materials. Applying the holding of the Ninth Circuit in this dangerous environment severely undermines the efforts of the prison administrators in the *amici* States to maintain the order and security of their correctional institutions. The holding will allow inmates to avoid prison regulations and discipline through communications purporting to be "legal advice."

The holding of the Ninth Circuit also elevates inmate law clerks to a position substantially equivalent with attorneys, thus enhancing the status of the inmate law clerks in the prison. Creating a special status for some inmates leads to dissension, and presents other difficult problems of maintaining order and security in the institutions. Restricting inmate-to-inmate

correspondence is reasonably related to the institutions' interest in maintaining order and security, an interest which the Court has always recognized as a legitimate penological interest.

The *amici* States urge the Court to **reverse** the Ninth Circuit's holding and reaffirm the broad discretion afforded to prison officials to restrict inmate-to-inmate correspondence.

ARGUMENT

The prison environment is volatile. The efforts of prison officials to maintain order and security are highly demanding and require constant vigilance. The Court has repeatedly recognized that prison officials have broad discretion in restricting inmates' First Amendment rights of expression and association. The decision below, which confers an independent, freestanding and unrestricted First Amendment right on an inmate law clerk to give "legal advice" to other inmates, goes beyond any decision of the Court and undermines legitimate penological objectives of prison officials to maintain order and security.

I. THE FIRST AMENDMENT DOES NOT GUARANTEE A STATE PRISON INMATE LAW CLERK AN UNRESTRICTED RIGHT TO COMMUNICATE WITH ANOTHER INMATE REGARDING PENDING LEGAL MATTERS.

The Court has repeatedly recognized that an inmate's constitutional rights may be restricted to the extent that they conflict with institutional rules which are reasonably related to a legitimate penological interest. *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Turner v. Safley*, 482 U.S. 78 (1987); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Lewis v. Casey*, 518 U.S. 343 (1996). Specifically, the Court has held that the First Amendment rights

of inmates "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations . . . possess the likelihood of disruption of prison order or stability . . ." *Jones*, 433 U.S. at 132. While recognizing that inmates generally have a right of access to courts, *Johnson v. Avery*, 393 U.S. 483 (1969), the Court has not expanded the right of access to hold that an inmate law clerk has an independent, freestanding unrestricted right under the First Amendment to provide legal advice or assistance to another inmate, especially where, as here, an attorney was appointed, and another inmate law clerk was provided by the institution. *Lewis v. Casey, supra.* The Court should not do so in this case.

The Ninth Circuit found that a letter written by Respondent (a high security inmate) to a fellow inmate (Tracy, a maximum security inmate) was an expression entitled to a special, enhanced level of protection under the First Amendment because it contained "legal advice." Pet. App. at 6-7. Additionally, the Ninth Circuit held that Respondent had an independent First Amendment right of association to provide legal assistance to Tracy, not because Tracy who already had court-appointed counsel needed legal advice, nor because Respondent was assigned as a law clerk for Tracy, but because Respondent had provided Tracy legal assistance "on several occasions in the past." Pet. App. at 7. Having established this independent right of an inmate acting in the capacity of a law clerk, the Ninth Circuit then applied a balancing test finding that the prison's penological interest in maintaining order and security is "... at a low ebb when the correspondence in question is legal advice", and held that prison officials could not restrict such communications between inmates. Pet. App. at 12-13. The decision below is neither supported by the decisions of the Court nor any other circuit court.

Correspondence by non-lawyers purporting to give legal advice in a prison has no special status under the First

Amendment. As a threshold matter, although the Ninth Circuit makes no distinction between "legal advice" and "legal assistance", clearly inmate law clerks are not attorneys and have no independent basis to assert a right to provide legal advice. *See, e.g.,* Fla. Admin Code § 33-501.301(10)(i) (prohibiting inmate law clerks from practicing law or appearing in judicial or administrative proceedings on behalf of other inmates). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977) (regulation of the practice of law is "... at the core of the State's power to protect the public").

While the Court has generally recognized an inmate's right of access to courts, the Court has never characterized this as a right of the inmate law clerk. In *Lewis*, 518 U.S. at 350-51, the Court clarified that the right of access to courts, as articulated by *Bounds v. Smith*, 430 U.S.817 (1977), did not constitute a *per se* right to legal assistance. Because there is no freestanding right to receive legal assistance from an inmate law clerk, it is unreasonable to say that the inmate law clerk has a right to give legal assistance. The Ninth Circuit's holding that Respondent has a First Amendment right to give legal assistance to other inmates contravenes *Lewis.*

In *Johnson v. Avery*, *supra*, the Court rejected a prison regulation that prohibited prisoners from assisting each other with habeas corpus applications and other legal matters. The basis for that decision, however, was the fact that no alternative forms of legal assistance were made available to the prisoner, *Johnson*, 393 U.S. at 489, and in *Lewis,* the Court explained that "legal assistance programs are not ends in themselves, but only means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *See Lewis*, 518 U.S. at 351 (citation omitted). The instant case does not present a situation implicating the right of access to the courts. The state district court had already appointed an attorney to represent inmate Tracy, and prison

officials also had provided another inmate law clerk to assist him in this matter. Pet. App. at 7. Ironically, the Ninth Circuit has held that a criminal defendant does not have an unrestricted right to counsel of his choice, *see United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990), but here implicitly holds than an inmate has a right to an inmate law clerk of his choice.

The *Lewis* Court made clear that an inmate's right of access to courts is not to be construed without adequate deference to the judgment of prison administrators. *Lewis,* 518 U.S. at 361. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 361 (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977)).

The holding of the Ninth Circuit appears to confer on an inmate law clerk a freestanding constitutional right to provide legal advice to other inmate. By contrast, other circuits have refused to recognize an independent right which is freestanding from an inmate's right of access to the courts.[1] Indeed, most circuits have not even recognized an inmate's standing to assert

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[1] *See, e.g., Williams v. Nix*, 1 F.3d 712, 716 (8th Cir. 1993) ("[A]n individual inmate does not have a constitutional right to 'practice' jailhouse law."); *Smith v. Maschner*, 899 F.2d 940, 950 (10th Cir. 1990) (An inmate "does not have a protected interest in providing legal representation to other inmates."); *Tighe v. Wall*, 100 F.3d 41, 42 (5th Cir. 1996) (The court noted that an inmate has no constitutionally protected interest in a specific work assignment and held that "[t]he right to act as inmate counsel in a certain facility is no exception to that general rule."); *Gassler v. Rayl*, 862 F.2d 706,707 (8th Cir. 1988) ("There is, however, no right to be or to receive legal assistance from a jailhouse lawyer independent of the right of access to the court."); *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) (Court recognized that there was "technically" no right to assist.).

another inmate's claims.[2] The Ninth Circuit's holding should be rejected in favor of the reasoning of the other circuits on this issue. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 561-63 (1974) (refusing to second-guess actions taken by prison officials in recognition of the volatile nature of the prison environment); *Hewitt v. Helms*, 459 U.S. 460, 470-71 (1983).

II. LEGITIMATE PENOLOGICAL INTERESTS SUPPORT REGULATION OF INMATE COMMUNICATIONS INCLUDING THOSE OF LAW CLERKS.

A. Restrictions on inmate-to-inmate correspondence are intended to prevent inmates from passing contraband to each other.

Inmates across the country have attempted to pass contraband disguised as legal mail or legal material. If the Court approves the Ninth Circuit's holding and inmates may exchange purported legal mail without restriction, these incidents will increase dramatically and pose an extreme threat to the order and security of the institutions. Several examples illustrate this

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[2] *See Bass v. Singletary*, 143 F.3d 1442, 1446 (11th Cir. 1998) inmate law clerks, "did not have standing to assert other inmate' claims for denial of their rights of access to courts."); *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) ("In the non-class-action context a prisoner has no standing to litigate another prisoner's claim of denial of access to the courts."); *McDonald v. Hall*, 610 F.2d 16 , 19 (1st Cir. 1979) (same); *Buise v. Hudkins*, 584 F.2d 223, 227 (7th Cir. 1978) (same); *Rhodes v. Robinson*, 612 F.2d 766, 769 (3d Cir. 1979) ("Prison writ writers have standing to assert other prisoners' right of access to the courts."); *Gibbs*, 10 F.3d at 378 ("[P]rison officials may not prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available."). *And cf. Smith*, 899 F.2d at 950 ("Prison inmates do not possess the right to a particular prisoner's help in preparing their legal materials.")

point.[3]

In Ohio, inmates received transcripts as part of their purported legal mail in which officials discovered carved out areas in the bindings where cocaine and other drugs were concealed. In Florida, inmates have sent contraband such as marijuana and money in inmate-to-inmate correspondence labeled as legal mail. Another inmate in Florida was found with a homemade "law book" which contained nude pictures of children and adult females among purported legal materials. Inmates in New York have engaged in the practice of "kiting" in order to avoid the prohibition against inmate-to-inmate correspondence.[4] In another Florida case, a mailroom supervisor testified about finding hacksaw blades under the bindings of a transcript which was sent to an inmate as legal mail.

In Idaho, directions on how to manufacture drugs and potential weapons were found in legal materials and mail. In another Idaho case, two inmates were setting up a law practice from behind bars and were mailing materials to non-attorneys under the guise of legal mail. These inmates had also set up fee arrangements and were charging other inmates for legal work.

An inmate in New York was convicted of participating in racketeering activities as the leader of the Latin Kings gang while incarcerated at Attica. The court noted that the inmate was

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[3] Twenty copies of the compiled incident reports illustrating these examples have been lodged with the Clerk's Office.

[4] The practice of "kiting" involves mailing a letter marked as legal mail to an alleged attorney with a non-existent address. The letter bears the return address of another inmate so it is returned to that inmate when found undeliverable. A second practice of "kiting" involves placing insufficient postage on the letter and the letter is "returned" to the return name and address of another inmate. *See DiRose v. McClennan*, 26 F.Supp.2d 550 (W.D.N.Y. 1998).

skilled at using secret codes to control the Latin Kings organization and orchestrate numerous murders. *U.S. v. Felipe*, 148 F.3d 101, 109 (2d Cir. 1998). Placing such codes in allegedly legal mail would pose a severe threat to the internal order and security of the institution if exchanged within the institution and a more far reaching threat if sent outside the prison environment without inspection. In *Sasnett v. Sullivan*, 908 F.Supp. 1429, 1435 (W.D. Wis. 1995), the court noted that "[t]he most time-consuming aspect of a cell search is the searching of paper such as letters, legal materials, books magazines and newspapers but it is necessary for the security of staff, inmates, and the public. Officers have found razor blades and drugs in such papers as well as motor vehicle registration stickers stolen by an inmate from his institution's production factory and intended to be sent to his family for illegal sale 'on the street.'" (emphasis added).

During the search of an inmate's cell in Virginia, a document was discovered hidden among legal materials which outlined the procedure on how to assemble several different incendiary devices. A further search revealed materials for constructing such a device. In *Altizer v. Deeds*, 191 F.3d 540, 5491 (4th Cir. 1999), the court upheld inspection of an inmate's legal mail noting that during the course of the litigation the inmate had attempted to mail a homemade knife in his legal mail to the federal district court.

B. Prison security and operation will be threatened if inmate law clerks are afforded special rights or a special status.

The Ninth Circuit's decision has the dangerous effect of conferring a special right on inmate law clerks or, for that matter, any inmate who purports to provide legal assistance, thereby elevating such inmates to positions of influence within the prison system. It is well recognized that allowing an inmate to have a

position of power and authority over other inmates presents a serious threat to prison security. *See, e.g., Cooper v. Tard*, 855 F.2d 125 (3rd Cir. 1988)(recognizing the threat to prison authority by inmate adherents of the Nation of Islam who set themselves apart from the other inmates as an affinity group with an established hierarchy). Indeed, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 127-129, the Court recognized the rational relationship between banning inmate solicitation and group meetings where prison administrators claimed that such activity could potentially cause inmate organizers to be power figures among inmates and misuse their influence.

If the Court were to recognize greater First Amendment protection for correspondence to or from an "inmate law clerk" or require heightened scrutiny of prison regulations restricting such correspondence, the Court would be elevating "inmate law clerks" to quasi-attorney status. Such a holding would have a direct and adverse impact on the States because at least 29 states have formal "inmate law clerk" programs or policies which authorize inmates to assist other inmates with legal matters. Florida, for example, has established a program to "certify" inmates as law clerks. Fla. Admin Code § 33-501.301(10). Other states which report having formal training and/or certification programs for inmate law clerks are Illinois, Kentucky, Louisiana, Massachusetts, Michigan, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont and Wyoming. (Source: Fla. Attn'y Gen. phone and e-mail survey of state corrections departments, Oct. 2000). States which report having inmate law clerks but which do not provide formal training or certification for them are Alaska, Georgia, Nebraska, Nevada, New York, South Carolina, and West Virginia. *Id.* States which report having "informal" programs which allow inmates to assist each other with the preparation of legal materials include Indiana, Maryland, Mississippi, New Mexico, Ohio, Texas, Washington and Wisconsin. *Id.*

C. Other "legitimate penological interests" will be frustrated if the Ninth Circuit's holding is affirmed.

In reviewing inmate cases, the Court has held that the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials. *Meachum v. Fano*, 427 U.S. 215 (1976); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). "Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Preiser*, 411 U.S. at 492.

The type of legitimate penological interests recognized by courts throughout the country include: *DiRose v. McClennan*, 26 F.Supp.2d 550 (W.D.N.Y. 1998) (heightened scrutiny of inmate's mail was justified after escape plans were found in his mail; abstract of officer's drivers license with home address was confiscated in order to maintain security for correctional officers and to prevent the practice of "kiting."); *Johnson v. Fout*, 173 F.3d 429 (6th Cir. 1999) (rule prohibiting law clerks from charging for their assistance upheld as necessary to maintain security of institution by preventing disagreements and violence among inmates.); *Herlein v. Higgins*, 172 F.3d 1089 (8th Cir. 1999) (court upheld ban on musical cassettes containing labels warning of explicit lyrics as reasonably related to legitimate penological interest of maintaining security; music with violent or sexually explicit lyrics might present security risk.); *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999) (rule prohibiting magazines depicting sexual penetration was necessary to ensure the safety of inmates and prison officers, and protect female officers from abuse and harassment and such publications are likely to cause inmates who come in contact with the materials to harass and/or abuse other individuals); *Rhoden v. Campbell*,

202 F.3d 269 (6th Cir. 1999) (inmate denied request for day off from work to celebrate Million Man March recognizing that staffing and security dilemmas are legitimate penological interests, also upheld decision not to allow inmate to wear fez at work because such religious headgear may be used to conceal drugs, weapons, or other contraband and may spark internal violence among prisoners thus posing security threat); *Billups v. Galassi*, 202 F.3d 272 (7th Cir. 2000) (spot-checks of inmate's non-legal mail was reasonably related to legitimate penological interest of preventing threat which letter presented to prison's security and order; the letter, which described sex act which inmate and girlfriend performed in visitors area could encourage other prisoners to attempt sexual acts during visiting hours, create disrespect for prison rules and foster emotionally charged disputes amongst prisoners over the letter's possession if the letter were to become lost or stolen).

D. Restrictions on inmate-to-inmate correspondence are *per se* reasonable under the *Turner v. Safley* test.

In *Turner*, the Court reviewed state prison regulations governing inmate-to-inmate correspondence and inmate marriage. The Court expressly upheld the rule restricting inmate-to-inmate correspondence because it was reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89. As pointed out in the Petitioner's brief on the merits, the Missouri prison regulation approved by the Court's decision in *Turner* prohibited *all* inmate-to-inmate correspondence (including correspondence dealing with legal matters) absent prior approval of prison officials. This regulation, the Court noted, was "consistent with the practice of other well-run institutions, including institutions in the federal system." *Turner*, 482 U.S. at 93. A significant number of states have regulations (or uncodified policies) which prohibit or stringently regulate inmate-to-inmate correspondence. Many of these regulations and policies are patterned after the federal prison regulation (28

C.F.R. § 540.17 (1986)) cited in the Petitioner's brief and, presumably the subject of the Court's reference in *Turner*. The prison regulation adopted in Florida, for example, provides:

> Correspondence with inmates of other penal institutions shall be subject to the approval of the warden of each institution. Either warden may withhold approval if he finds that the intended correspondence would present a substantial threat of interference with the security, order of the rehabilitative objectives of his institution.

Fla. Admin. Code § 33-602.401(4). *Accord* 15 Cal. Admin Code § 3139; Kan. Admin. Regs. 44-12-601(j); 103 Mass. Code of Regs. § 481.21; N J. Admin. Code § 10A:18-2.5; 7 N.Y. Comp. Codes R. & Regs. §§ 720.3(b)(3), 720.6; 37 Pa. Code § 93.2(b)(1); 37 Tx. Admin. Code § 291.2(1)(A). *See also* N.J. Admin. Code § 10:5-6.29(a) ("[I]nmates assigned to the Security Threat Group shall not be permitted to send mail to, or receive mail from, any other incarcerated inmates"); Fla. Admin. Code § 33-501.301(10)(l) (requiring inmate law clerk to obtain prior approval from prison officials to correspond with an inmate law clerk at another institution); Conn. Agencies Regs. § 18-81-30(c)(3) (prohibiting correspondence between inmates except those who are immediate family members); Iowa Admin. Code § 201-20.4(3)g. (same); Utah Admin. R. 251-705-3(19) (prohibiting inmate-to-inmate correspondence in the absence of a "compelling need" and where there is no alternative means of accomplishing that need). *Cf.* 210 Ind. Admin. Code § 3-1-16(b) (authorizing sheriffs to restrict correspondence between inmates in county jails).

Even states which do not appear to prohibit inmate-to-inmate correspondence have regulations which authorize prison officials to open, read and withhold inmate correspondence under certain circumstances. *See, e.g.*, Ohio Admin. Code § 5120-9-18(K); Ga. Comp. R. & Regs. § 125-3-3.01(3); Wis.

Admin. Code § DOC 309.04(2)(c), (4). The Ohio regulations, like the regulations of most states, restrict the prison officials' ability to read "legal mail." *See* Ohio Admin. Code § 5120-9-18(C)(1)-(4) ("legal mail" may only be opened by prison officials in the presence of the inmate and if there is a "reasonable belief that the envelope contains contraband"). However, neither Ohio nor any other states whose regulations define "legal mail" include inmate-to-inmate correspondence or, more specifically, correspondence to or from an "inmate law clerk" within that definition. *See id.* at § 5120-9-18(C). *Accord* Fla. Admin. Code 33-602.402(2); 20 Ill. Admin. Code 525.110(g); Kan. Admin. Regs. § 44-12-601(a)(1); 5 N.C. Admin. Code § 2D.0307(a); Or. Admin. r. 291-131-0010(15); 6 Va. Admin. Code § 15-40-10; Wash. Admin. Code § 137-48-020(8). If the Ninth Circuit's holding were adopted, it would be tantamount to classifying inmate-to-inmate correspondence on legal matters as "legal mail." *Cf. Hall v. Singletary*, 999 F.2d 1537 (11th Cir. 1993) (citing *Turner* and upholding prison's refusal to permit inmate to correspond with another inmate on a legal matter where inmate had failed to comply with prison's rule).

If the Court were to adopt the reasoning of the Ninth Circuit that inmate-to-inmate correspondence purportedly relating to legal matters is entitled to greater First Amendment protection, the Court would not only be receding from its holding in *Turner* and its progeny but would also be invalidating the regulations and practices of many States' prisons, as indicated above.

E. The prison regulations and the actions of the prison officials in this case are reasonable under the *Turner v. Safley* test.

The Court in *Turner* articulated a four-prong test in evaluating the constitutionality of prison rules which impinge on the inmate's constitutional rights. *Turner*, 482 U.S. at 89-90. In deciding whether prison rule is valid, the court should consider:

whether there is valid, rational connection between prison regulation and legitimate governmental interest put forward to justify it; whether there are alternative means of exercising rights that remain open to inmates; whether accommodation of asserted rights will have significant "ripple effect" on fellow inmates or prison staff; and whether there is ready alternative to regulation that fully accommodates prisoners' rights at de minimis cost to valid penological interest. *Id.* at 107.

Respondent, an inmate law clerk classified as high security, attempted to mail a letter to inmate Tracy who was confined in the maximum security unit of the prison. In addition to providing advice on how to handle Tracy's case, Respondent's letter contained allegations about the officer whom Tracy attacked and more information about personal events occurring outside the prison. The facts of the instant case satisfy the test established in *Turner*. First, the policy allowing censorship of inmate-to-inmate correspondence is legitimately related to the institution's interest in maintaining the security of the institution. Second, there was an alternative method of communicating such information because inmate Tracy already had a court-appointed attorney, to whom communication was not restricted, as well as a prison supplied inmate law clerk.

Moreover, accommodating Respondent's asserted right in the instant case would have a tremendous ripple effect on the prison system by establishing another viable option for passing contraband among inmates. Opening additional channels for passing contraband and information to maximum and high security inmates would threaten the security of the institution. Accordingly, the penological interests in this case clearly satisfy the *Turner* standard of review.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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